

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

SPORTSCHANNEL FLORIDA ASSOCIATES d/b/a FOX
SPORTS NET FLORIDA¹

Employer

and

Case 12-RC-8920

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS,
ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES,
ITS TERRITORIES AND CANADA, AFL-CIO, CLC²

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

SportsChannel Florida Associates, a New York general partnership with offices in Sunrise, Florida, owns and operates Fox Sports Net Florida ("Fox Sports" or "the Employer"). Fox Sports is a basic cable sports broadcasting network that operates from remote mobile trucks in various locations in Dade, Broward, and Palm Beach Counties. The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC ("the Petitioner" or "the Union") filed a petition on April 25, 2003, seeking to represent various freelance technicians performing work in connection with the telecasting of sports events in South Florida. At the hearing in this matter, the Petitioner amended the description of the petitioned-for unit to include the following: All regular part-time freelance employees in the categories of technical director, camera operator, videotape operator, digital disk device operator (e.g., EVS, DDR, profile), video technician (shaders), including assistant video technicians, audio technicians, audio assistants, Infinit! operators, graphic coordinators, Fox Box/score box operators, stage managers, and

¹ The name of the Employer appears as corrected at the hearing.

² The name of the Petitioner appears as corrected at the hearing.

utility technicians, performing work, including pre-production, production, and post-production work, in connection with the telecasting of sports events in Dade, Broward and Palm Beach Counties.³ Both parties filed briefs with me.

The parties disagree on the following issues: (1) whether the freelance technicians are employees within the meaning of Section 2(3) of the Act or independent contractors; (2) if the technicians are employees, whether they are employed solely by Mikeyco, d/b/a A Crew For You such that Fox Sports has no employer-employee relationship with the technicians, or employed by both Fox Sports and A Crew For You as joint employers; (3) whether freelance technicians working on a visiting team's telecast should be included in the unit; (4) whether technicians in the position of "cable puller" should be included in the unit; (5) whether the unit should be limited to telecasts currently produced by Fox Sports; and (6) whether the unit should include work performed at the Marlins baseball spring training games in Jupiter, Florida, which is in Palm Beach County.

The Employer contends that the freelance technicians are independent contractors. Further, the Employer contends that if the freelance technicians are found to be employees within the meaning of the Act, A Crew For You is the only employer of these employees and that Fox Sports is not a joint employer with A Crew For You and thus has no connection to the employees. If the freelance technicians are found to be employees and Fox Sports is found to be a joint employer with A Crew For You, the Employer claims the unit should not include the technicians performing work on a visiting team's telecast because Fox Sports does not codetermine their terms and conditions of employment and additionally, those employees lack a community of interest with the freelance technicians performing work on the home team telecasts. Further, the Employer contends that "cable pullers" should be excluded from the unit

³ At the hearing, the Petitioner clarified that the following classification names are interchangeable: "graphic operator" includes "Infiniti operator"; "audio technician" includes "Audio 1"; "audio assistant" includes "Audio 2"; "video technician shader" includes "video shader"; "videotape operator" includes "tape operator"; "digital disk device operator (EVS)" includes "EVS op"; "camera operator" includes "hard cameraman," "HH cameraman," and "robotic cameraman"; "graphics coordinator" includes "AP font assistant" and "font assistant"; "Fox score box operator" includes "Fox Box op"; and that "audio assistant" includes "parab op."

because they lack a community of interest with the other employees. Also, the Employer argues that the unit should not include freelance technicians who may work at events or venues where Fox Sports currently has no presence. Lastly, the Employer contends the freelance technicians performing work at the Florida Marlins spring training baseball games in Jupiter should be excluded because of the geographic separation of Jupiter from Miramar, i.e., where the Marlins regularly play home games during the season. The Employer estimates that there are approximately 80 to 100 eligible voters in a unit of technicians limited to Dade and Broward Counties, excluding technicians who work on visiting teams' telecasts and cable pullers.⁴

The Petitioner, on the other hand, contends that the freelance technicians are employees within the meaning of the Act. Further, the Petitioner contends that the freelance technicians are employed by Fox Sports, a statutory employer, and that the issue of joint employer status is irrelevant. Lastly, the Petitioner contends that the unit should not be limited in the manner described by the Employer and that the petitioned-for unit, as amended at hearing, is appropriate. The Petitioner estimates that the number of technicians in the petitioned-for unit is approximately 100.

Based on the evidence and relevant law, I conclude that the freelance employees are employees within the meaning of Section 2(3) of the Act. I also conclude that Fox Sports is a statutory employer of the freelance technicians and that the petitioned-for unit is appropriate.

I. RELEVANT FACTUAL BACKGROUND

A. Fox Sports Programs

Fox Sports is a basic cable sports broadcasting network that provides 24-hour sports programming. Fox Sports provides national and local programming. National programming is provided by its "backdrop service," Fox Sports Net, from a satellite feed in Los Angeles and

⁴ Following the hearing in this matter, the Employer requested that, in the interest of economy, the case be transferred to the Board for decision. The Employer contends that the existing case law does not specifically deal with freelance sports technicians and that these same issues have been raised by other industry employers in cases involving this Petitioner and will be raised in connection with other petitions that it anticipates will be filed by the Petitioner. I have decided to render the decision herein instead of transferring the case directly to the Board.

includes talk shows, magazine shows and live college events. Local programming is produced locally by Fox Sports. Fox Sports produces approximately 75 live telecasts of home and away NHL Florida Panthers hockey games of which 32 games are home games. The Panthers home games are telecast from the Office Depot Center in Broward County. Fox Sports produces approximately 95 telecasts of Florida Marlins baseball games over cable and 55 baseball games on over-the-air television. The Marlins games take place at Pro Player Stadium in Dade County. Fox Sports produces the telecasts of three Marlins spring training games per year from a stadium located in Palm Beach County. Fox Sports also produces six University of Miami home football games from Dade County and 15 University of Miami home baseball games, which are telecast from the campus in Dade County. In addition, Fox Sports produces approximately six University of Miami women's basketball games from the Dade County campus.

Fox Sports' customers are cable system operators and satellite operators throughout the State of Florida that carry the programs into the homes of viewers who subscribe to the customers' services. Cable systems operators include Adelphia Communications and Comcast and satellite customers include Direct Satellite Television, also known as Direct TV, and Echostar, also known as Dish Network.

B. The Equipment and Crew for Fox Sports Productions

As noted above, Fox Sports produces its telecasts from remote mobile trucks at the venues where the sporting events take place. Since approximately 1999, Fox Sports has contracted with F&F Productions for the supply of these remote mobile trucks. The trucks include all the necessary equipment for the telecasts such as cameras, videotape machines, graphics machines, audio microphones, announcer headsets, etc. The trucks contain a control room with 25-40 television monitors, an audio control booth, a video control room, and a videotape room. Cameras from the truck are set up in various locations at the venue and their images are projected onto the monitors in the truck. Fox Sports also supplies these trucks to the visiting team's broadcaster for Panther hockey games pursuant to an NHL rule that requires

the home team to provide a truck and crew to the visiting team. Fox Sports pays F&F for the trucks but is reimbursed by the visiting team.

The individuals involved in the production of Fox Sports programs include the announcers, a producer, and a director. The announcers are designated by the teams. The producer and director are employed by Fox Sports with the exception of Michael Rubin and Frank DiVincentis who work as the producer and director, respectively, on Panthers' telecasts and are engaged on an independent contractor basis. In addition to the afore-mentioned positions, the production of Fox Sports programs also include the following crew of approximately 16 freelance technicians that are the subject of the instant petition: technical director, two videotape operators, digital disc device (EVS) operator, video technician (shader), assistant video technician, audio assistant, graphics operator (Chryon/Infinit!), graphics coordinator, Fox Box/score box operator, stage manager, utility technicians and four to six camera operators. As to equipment, some of these individuals may bring their own laptops or other items to work but they are not required to do so for the production of the telecasts. As discussed in more detail below, these individuals are supplied to Fox Sports by A Crew For You by contract. As with the truck and equipment, Fox Sports supplies a crew of freelance technicians to the visiting team for telecasts of the Panthers hockey games.⁵ Fox Sports pays A Crew For You for the crew and is reimbursed by the visiting team.

C. Relationship Between A Crew For You and Fox Sports

Since approximately October 2001, A Crew For You has supplied the technicians to Fox Sports for the production of its telecasts.⁶ Mike Rubin is the owner and President of Mikeyco. As noted above, Rubin also serves as producer of the telecasts of the Florida Panthers hockey games. In addition, he sometimes serves as a tape operator for Marlins home baseball games

⁵ The visiting team provides its own announcers, producer, and director.

⁶ Prior to A Crew For You, F&F provided the crew for Fox Sports productions in addition to the trucks and equipment. F&F exercised its contractual option in 2001 to cease providing the crews.

when necessary. In 2001, Rubin discussed taking over the crewing of the technicians with Brad Heard, the Employer's Vice President of Programming and Operations, and the two agreed that Mikeyco would succeed F&F in this regard.⁷ Rubin registered "A Crew For You" as a d/b/a with the State of Florida and began operating a crewing service.

A Crew For You and Fox Sports operated under an oral agreement this first year but subsequently reduced their agreement to writing in 2002. A Crew For You and Fox Sports currently have a written contractual agreement in place with a term of October 1, 2002 to September 30, 2003. The contract provides, among other things, that Fox Sports will pay A Crew For You the rate for the crew personnel as provided in the contract plus an additional specified amount for each crew member provided by A Crew For You. In addition, the contract states that A Crew For You and the crew personnel shall have no claim, financial or otherwise, for compensation in connection with the productions of the telecasts. The contract also states that no employee or independent contractor of A Crew For You shall be deemed an employee of Fox Sports. Currently, Fox Sports comprises 57% of Mikeyco's crewing service business and the remaining 43% of its business comes from crewing for other customers.

D. The Freelance Technicians Utilized by A Crew For You

A Crew For You places a total of approximately 300 technicians with its customers. However, only 103 of these technicians have worked at least two Fox Sports' telecasts within the last year. According to the Employer's calculations, 61 of these employees have worked at least two Panthers visiting team telecasts and 44 of the 61 employees worked at least 6 games on the Fox Sports telecasts.

The freelance technicians utilized by A Crew For You are selected by Rubin based on his familiarity with those individuals from his years of experience in the industry. Some are selected based on resumes submitted to Rubin and their qualifications are determined by Rubin calling other crewers and producers and asking about the individual. When the technicians first

⁷ Rubin has been in the industry for many years and knows many of the freelance technicians in Florida.

perform work for A Crew For You, they fill out and sign a “Company/Contractor Agreement” form that states, among other things, that the technician is an independent contractor. The freelance technician then provides A Crew For You with a W-9 form for tax purposes that sets forth the individual technician’s taxpayer identification number. Approximately 25% of the 103 technicians render their services as a corporation rather than an individual. A Crew For You pays the freelance technicians directly. It does not withhold payroll or other taxes from the wages paid to the technicians nor does it pay benefits or workers compensation insurance⁸ for the freelance technicians.⁹

The technicians are expected to arrive to work an event with the necessary skills and experience. Neither Fox Sports nor A Crew For You provides training to the technicians. The technicians learn how to use the equipment essentially from experience and/or training classes held by some manufacturers of the equipment. No evidence indicates that any of the technicians are licensed or hold any special degrees.

E. The Crewing Process

The process of providing the freelance technicians to Fox Sports begins when a team publishes its schedule of games. The teams will send this schedule to Fox Sports. Fox Sports will then send a letter to A Crew For You notifying it of the schedule of games that will be televised and the approximate “call times” the technicians are to appear for each game.

Chip Singer of A Crew For You,¹⁰ prepares a schedule of the games and sends the schedule with a cover letter to a preferred group of approximately 35-40 technicians. Fox Sports does not direct A Crew For You in who to schedule but will request that A Crew For You use the same technicians that have worked on Fox Sports’ telecasts in the past. The cover letter asks the technicians to indicate their availability on the schedule and send it back to Singer. A Crew For You then begins to form a schedule of the individuals available to work at the particular

⁸ But, the contract between A Crew For You and Fox Sports requires A Crew For You to maintain workers’ compensation insurance that meets state law.

⁹ However, two persons, Rubin and his wife, receive benefits from Mikeyco.

events and will repeat this process with a secondary list of technicians until the slots for each game are filled. The same process is utilized to schedule a crew for the visiting team's broadcast for Panther games except that the crew is determined on a game by game basis and A Crew For You does not receive as much notice as it does from Fox Sports.

The freelance technicians are not obligated to work any of the games and are free to work as many event dates as they wish. Once a technician has indicated a willingness to work a particular event, this decision is not binding and the technician is free to cancel those event dates for any reason. The technician will notify A Crew For You that he/she is canceling and A Crew For You may ask the technician to assist it in finding a replacement by calling several other named technicians. However, A Crew For You only makes this request as a courtesy on the part of the technician and there is no penalty to the technician for canceling or for not being able to locate a replacement. In addition, the freelance technicians are free to work on sports productions produced by competitors of Fox Sports and crewed by other crewing companies and may cancel an event date for Fox Sports to work for a competitor without penalty.

After A Crew For You has formulated a crew list for the games, it will send the list to Fox Sports for review. If Brad Heard does not recognize a name on the list, he will contact Mike Rubin to inquire about that particular individual's qualifications. Heard has never requested that Rubin find a replacement or indicated any dissatisfaction with any of the technicians supplied by A Crew For You.¹¹ If a technician cancels after the list is sent, A Crew For You will send revised lists to Fox Sports.

F. The Process of Producing the Sports Telecasts

As noted above, for each telecast, the production process typically includes the announcers, producer, director and the freelance technicians provided by A Crew For You. Most individuals arrive about six hours prior to the start of the game, which is the call time.

¹⁰ Chip Singer also works as one of the technicians on some of the telecasts.

¹¹ On a couple of occasions with A Crew For You's predecessor, Heard indicated dissatisfaction with a particular technician and the crewer did not refer that individual to work for Fox Sports again.

During this time, the producer ensures that certain audio, visual, and graphic materials will be placed on the air that day and distributes these items to the appropriate people. He is also speaking with the announcers regarding the pre-game show. Also during this time, the director and technicians conduct the facilities check ("FACS check") to ensure that all the equipment is hooked up and running properly. Following the FACS check, a pre-production meeting is held for most of the crew where essentially, the camera operators are told which players to focus on during the game. After this meeting, the freelance technicians take lunch.

The producer for each telecast has the highest responsibility. He organizes the production, communicates the format, the story line and what is going to be performed within the telecast regarding the announcers for each telecast. The story line is essentially what the producer thinks should be discussed by the announcers during the telecast concerning various subjects such as a long hitting streak of one of the baseball players. Prior to the telecast, the producer will discuss the story line with the announcers. The producer will also communicate this story line to the tape operators in the truck and will ask the tape operators to put together some highlights that will reflect that story line. When there are multiple story lines, the producer will ask the digital recording device operators or tape operators to put together highlights in a creative way to emphasize those story lines during the telecast. Also prior to the telecast, the producer may give the audio mixer in the truck the list of highlight music to be played at specific times during the telecast. During the telecast, the producer watches the monitors in the truck and the videotape that is used to capture replays. The producer will ask the videotape operators to "sell" him the different camera angles that have been routed into their tape machines. This "selling" is a process by which the tape operators will offer the producer what they think may be the best angle of a particular play that should be used in replays. In addition, the producer communicates with the announcers to let them know what replays are on the way and the announcers will also ask for specific replays.

During the telecast, the director sits in between the producer and the technical director on a bench in front of the monitors in the truck. The director is essentially responsible for putting together the full collage of the video that is put on the air. He communicates to the technical director which machines and what cameras to put on the air. The director will first “ready” the camera operator or tape operator to alert them that in a minute or two, the particular shot will go on air. Camera operators will also “sell” some of their camera shots to the director.

Based on the record testimony, the duties of each freelance technician on the telecasts are as follows:

Technical Director: The Technical Director operates a video switcher during the telecast. This device is used in response to the cues by the Director to take certain shots to be routed to “the air.” Prior to the telecast, the technical director sets up the monitors and the switches in the control room and labels them so that he can easily identify which images and feeds to manipulate. The technical director has the discretion as to how to set up and label these items. Then, the technical director oversees the FACS check, which is a check to make sure that all the audio, visual, graphic feeds, and headset intercom system is working properly.

Camera Operators: The camera operators operate their cameras during the game. Camera operators “sell” their shots to the director in addition to taking shots that the director has identified. In addition, camera operators can hear the announcers in their headsets and will take shots to coincide with the announcers’ conversation. Prior to the game, they set up the cameras at various locations throughout the venue.

Videotape Operators and Digital Disc (EVS) Operators: The videotape operator operates the video recording equipment that records and plays back images received from the cameras. As noted above, the operators speak with the producer prior to the show about the “story line” of the telecast. A videotape operator will create replay and slow motion segments for use during the telecast and for the “tease,” which takes place at the beginning of the telecast and is used to grab the viewers’ attention. Also, as previously discussed, the operator will “sell” shots to the

producer during the telecast. The EVS operator does the same thing as a videotape operator except that the EVS equipment utilizes digital images on a computer disc that can be accessed randomly. This enables the EVS operator to perform online editing more quickly and easily. In addition, prior to the game, the EVS operator will locate the producer's tape bag, which contains images and highlights, and will transfer those images onto the EVS machine.

Video Technician (Shader): Prior to the telecast, the video technician unpacks the cables and hooks up the truck to the venue and participates in the FACS check. During the telecast, the video technician operates equipment that controls the color balance of the cameras to make sure that all of the camera angles have consistently uniform color and shading.

Audio Technicians (Mixers) and Audio Assistants: The audio technician controls the sounds that the viewer hears such as crowd noise, the crack of the bat, and the crashing of hockey players into the boards or each other. The audio assistant works under the direction of the audio technician and places microphones throughout the venue to implement the audio technician's plan as to the sounds the technician wants to capture and control. During the telecast, the audio technician operates the audio board, which controls the sounds. Prior to the telecast, the audio technician sets up the audio board similar to the way the technical director sets up the video monitors and switches.¹²

Graphic Operators (Chryon or Infinit!), Graphics Coordinators, and Fox Box/Score Box Operators: The graphic operator operates a graphics device called a Chryon or Infinit! that projects graphics, titles and messages over the images that appear on the television screen. The graphics coordinator supplies the operator with the statistical data and various information that the operator inputs into the graphic device. The Fox

¹² Several audio technicians take their laptops to work with them but it is not required. One audio technician brings his own microphones to the venue and he is paid a fee for this by F&F.

Box operator operates a computer that generates the box that is seen in the upper corner of the television screen that informs the viewer of the game score and summary such as the number of balls, strikes, runs, hits, and errors.

Stage Manager: The stage manager is involved in setting up the communication between the producer and the announcers and other crew members.

Cable Pullers: The job of cable pulling is performed at the University of Miami women's basketball games. Cable pullers pull the cable or keep the cable straight for a particular camera that is used at these games so that the camera operator or others do not trip over the cable. The Petitioner contends that this job is performed by utility technicians. The owner and president of A Crew For You testified, however, that his company calls the Sports Information Director at the college before the game who gives A Crew For You the name of individuals and A Crew For You will call and schedule the cable pullers. According to Rubin, cable pullers are usually students or individuals with little experience in the industry.

Utility Technicians: There is no record testimony as to what specifically these technicians do. The Petitioner argues in its brief that the technicians provide general assistance.

G. Wages and Working Conditions

As to labor relations policies covering the categories of technicians described above, the freelance technicians do not wear uniforms and are not required to comply with any dress code requirements. Fox Sports and A Crew For You do not distribute any handbooks, manuals, rules, or regulations to the freelance technicians. As to breaks, one freelance technician testified that he asks the director for permission to take a break and another technician testified that he will ask if anyone needs anything from him because he is going to take a break. Employer witness Brad Heard testified that the technicians have the authority to walk away from their equipment for a break. Regarding the lunch break, one freelance technician testified that Mike Rubin tells them when they can take a lunch break. Another testified that the lunch break is determined by when the FACS check is over and that the technical director might say the check is complete and they

can go to lunch. Another testified that the director is in charge of when they take their lunch breaks although it may always be at the same time.

With regard to compensation, as noted above, A Crew For You pays the technicians directly. A Crew For You keeps track of the technicians' time. At the venue, a Crew For You has a sign-in sheet that the technicians are required to sign in order to get paid. In situations where Rubin is not working at the venue as either a producer or tape operator, one of the technicians turns in the sheet to the crewer.¹³ The technicians are paid the amounts set forth in the wage schedule in the contract between Fox Sports and A Crew For You.¹⁴ The technicians are paid for a 10-hour day for each event even if they work less than 10 hours. If they work more than 10 hours, they are paid overtime.

II. ANALYSIS AND CONCLUSIONS

A. Freelance Technicians Are Employees

The freelance technicians are employees within the meaning of the Act, and not independent contractors. Although some indicia of independent contractor status are present in the instant case, a majority of factors lead to the conclusion that the freelance technicians are, in fact, employees.

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." In determining whether individuals are employees or independent contractors, the Board applies the common law test of agency. Roadway Package System, 326 NLRB 842, 850 (1998). Under this test, the Board examines all incidents of the parties' relationship, with no single factor being decisive. Id. at 850 (citations omitted). While all the Restatement factors should be considered, the trier of fact must determine whether

¹³ Individuals from the crewing company generally are not present at the venue unless they are working at the venue.

¹⁴ A Crew For You President and Owner Mike Rubin testified that these rates are the maximum rates that Fox Sports will reimburse him for paying the technicians although he does not pay the technicians any amount above or below these rates. However, Fox Sports Vice President of Programming and Operations testified that A Crew For You is not authorized to pay the technicians a rate that is higher or lower than that set forth in the contract.

or not there is a sufficient number of factors to establish the employee relationship. Id.

Significantly, the burden of proof falls upon the party asserting the independent contractor status. BKN, Inc., 333 NLRB No. 14, slip op. at 2 (2001) (citation omitted).

In examining the employee versus independent contractor issue in the entertainment industry, the Board has looked to numerous factors, including: (1) the degree of supervision or input the employer has in the individual's performance or creation; (2) whether the individual performs functions that are an essential part of the employer's normal operations; (3) whether the individual works exclusively for the employer; (4) the entrepreneurial discretion possessed or risk assumed by the individual; (5) whether the employer supplies the equipment/materials used by the individual; and (6) whether the employer withholds taxes and/or provides fringe benefits and/or workers' compensation coverage. BKN, Inc., 333 NLRB no. 14, slip op. at 2; Musicians (Royal Palm Theatre), 275 NLRB 677, 682 (1985); The Comedy Store, 265 NLRB 1422 (1982); Strand Art Theatre, 184 NLRB 667, 668 (1970).

Here, the presence of some factors suggest that the freelance technicians are independent contractors. The technicians are free to work for other employers at any time even after they have committed to work for the Employer. The technicians are paid for 10 hours per game regardless of whether they work a full 10 hours. And, no taxes are withheld from their paychecks and they receive no benefits. Also, the technicians sign a form for A Crew For You that states they are independent contractors. However, with regard to the latter two factors, I note that the Board does not regard as determinative the fact that a written agreement may define the relationship as one of "independent contractor," Big East Conference, 282 NLRB 335 (1986), or that the employer elects not to make payroll deductions or tax withholdings. Miller Road Dairy, 135 NLRB 217 (1962).

The presence of these few factors favoring independent contractor status is insufficient to overcome the Employer's burden of establishing such status where there exists other, more compelling, factors to support the conclusion that these technicians are employees. Here, the

evidence shows that the producer and director of the telecasts exercise supervision and control over the freelance technicians' work and/or performance. As discussed above, the overall telecast is designed to conform to the story line created by the producer. The director is in complete control over what images are shown on air by instructing the technicians as to what shots are to be taken and then directing the technical director to place those images over the air. Among other things, the technicians are told when to arrive for the crew calls and the specific equipment they are to use has been selected for them.

Admittedly, the producer and director do not instruct the technicians as to which buttons to push on the equipment or how to frame a shot. As the Employer contends, the nature of this work, i.e., the televising of a live sporting event, does not allow for such detailed instructions where things happen on a second-to-second and minute-to-minute basis.

Nevertheless, the producer and director control the production of the telecasts and the freelance technicians are required to conform to their directives. For example, videotape operators are given instructions by the producer prior to the telecast as to what the story line is so that the operators can come up with the relevant video to create a tease and/or highlights that conform to that story line. Sometimes, the producer will direct the tape operator on the specific video to find and use for this purpose. And, in every case, the producer will return prior to the telecast to review what the videotape operator put together. In addition, the audio mixer is given a script by the producer of exactly what music the mixer is to play and when.

Additional examples of such control are illustrated by the directions to the camera operators. Indeed, the director determines how the cameras will be used. Employer witness Mike Rubin testified that a camera meeting takes place before the telecast where the director instructs each camera operator as to which players they are responsible for shooting during that telecast. Throughout the telecast, the director instructs the operators as to what shots to take. Although the Employer argues that the camera operators are not directed as to what angles to shoot or how wide to pan, etc., Rubin testified that, at the initial camera meeting of the season,

the camera operators are told which camera they are operating and based on the specific camera, what type of shots to take, i.e., wide, tight, etc. I find that the fact the camera operator may exercise initiative by taking the obvious shot of a coach or player who is the subject of discussion by the announcers insufficient to establish that the producer or director lacks control over the operators' work.

Accordingly, the record reveals that ultimately, the producer and director guide the production of the entire telecast. Indeed, no image is broadcast over the air without specific direction by the producer and/or director. The fact that the producer and director do not instruct each technician on how to use the equipment and on every aspect of their job fails to establish that the producer and director do not exercise sufficient control over the manner in which the technicians perform their job.

I find that as to the supervision and control factor, this case is akin to Columbia Broadcasting System, Inc., 214 NLRB 637, 642 (1974), where the Board found that the Employer exercised sufficient supervision and control over documentary film editors. According to the Board, although the film editors called upon their artistic and technical skills in making the documentary, they did so to meet the demands of the producer who envisioned the documentary and the message he sought to put across. The Board explained that the producer had the complete responsibility of creating, developing, and putting the documentary into its final form for showing and that under no circumstances could the film editor substitute his judgment for that of the director and was there to satisfy the demands of the producer. See also The Pulitzer Publishing Company, 101 NLRB 1005, 1007 (1952) (television cameramen were employees where the employer's program, news events, or publicity director directed in detail the work of the cameramen).

Additional factors also support the conclusion that the freelance technicians are employees. Clearly, the freelance technicians perform an essential part of the Employer's operations in that the Employer regularly utilizes the services of the technicians to produce its

telecasts of various sporting events. Further, the technicians have no property interest in the Employer's production, nor do they have any significant entrepreneurial opportunity. Although the Employer contends that the freelance technicians exert control over their level of earnings by accepting as much or as little work as they choose, this factor does not distinguish the technicians from other on-call or as-needed employees whose income is typically directly related to the amount of time they are willing to work.

Also supporting a finding of employee status is the fact that the Employer informs the technicians when to appear for work and, through its lease with F&F, provides the technicians the equipment with which they work. Although the record indicates that some employees bring their own laptops, this extra equipment is not necessary to the production.

I find Young and Rubicam International, 226 NLRB 1271 (1976), upon which the Employer principally relies, distinguishable. In that case, there were numerous factors present that do not exist in the instant case that clearly established the photographers' status as independent contractors. For example, the photographers maintained their own studios where they performed most of their work. Also, the photographers had a significant capital investment in the highly sophisticated equipment used to complete their work. In addition, all of the photographers employed at least one full-time employee as an assistant and each employed an agent or representative who worked on a commission basis to seek work for the photographer, negotiate fees, etc. And, the photographers were paid on a flat fee basis, which had to cover their expenses such as the salaries of their assistants, commissions for agents, and use of their studios.

Rather, I find this case similar to Musicians (Royal Palm Theatre), supra, in which the Board held that freelance musicians for recordings used at a dinner theatre operated by the employer were employees, even though the musicians were not selected by the employer, were paid through a contractor, with no withholdings deducted by the employer, and were utilized for only a few hours, with no real expectation of future use. The Board held that these factors were

outweighed by the fact that the employer's musical director exercised complete control over the musicians, telling them when to appear, what music to play, and how the music should sound. Thus, the Board concluded, the musicians were “under the continuous supervision and exercised control of the [musical director] and subject to his complete discretion and artistic interpretation and taste.” 275 NLRB at 862. As discussed above, the freelance technicians remain at all times under the supervision of the producer and director who ultimately control all elements of the production.

B. Fox Sports is An Employer of the Freelance Technicians

Contrary to the Employer's contention, there is an employer-employee relationship between it and the freelance technicians.

If a user employer exercises some control over employees' terms and conditions of employment, a union may petition the user employer to represent those employees without naming the supplier employer as a joint employer. In M.B. Sturgis, Inc., 331 NLRB 1298 (2000), the Board held that a unit composed of employees that are jointly employed by a user and supplier employer and employees solely employed by the user employer is permissible under the Act without the consent of the employers. The Board clarified its previous decision in Greenhoot, Inc., 205 NLRB 250 (1973), which involved a petition for a supplier's employers, and held that a union may seek to bargain with only a single supplier employer even though the employees may be jointly employed by one or more user employers. 331 NLRB at 1308. According to the Board, the fact that a single supplier's employees may also be jointly employed does not require a union to name the joint employer or to litigate the existence of a joint employer relationship. Id., citing Chelmsford Food Discounters, 143 NLRB 780, 781 (1963).

Subsequently, in Professional Facilities Management, 332 NLRB 345 (2003), the Board upheld a petition filed solely against a user employer. The employer argued that the supplier employer was a joint employer of the employees and should be named in the petition. Guided by its decision in M.B. Sturgis, the Board found it unnecessary to determine the joint employer

status of the user and supplier employers because the union sought to represent “employees of a statutory employer.” The Board held that, for the same reasons it relied upon in M.B. Sturgis, the user employer can engage in effective bargaining with respect to the employees to the extent it controls their terms and conditions of employment regardless of its status as a joint employer with the supplier employer. Id. at 346.

Here, the evidence indicates that Fox Sports, as a user employer, has some control over the freelance technicians’ terms and conditions of employment. As discussed above, Fox Sports, via its producer and director, exercises supervision and control over the work of the freelance technicians. In addition, Fox Sports sets the call times for the technicians to report to the venue. And, Fox Sports determines through its contract with A Crew For You the amount paid to the technicians. These are terms and conditions that Fox Sports and the Union could effectively bargain over. Thus, Fox Sports is a statutory employer of the freelance technicians.

C. The Petitioned-For Unit is Appropriate

The Board’s procedure for determining an appropriate unit is to first look to the petitioned-for unit. If it is appropriate, then the inquiry ends. If the petitioned-for unit is not appropriate, the Board may examine alternative units suggested by the parties or may select a different unit. In determining whether employees possess a community of interest so as to constitute an appropriate unit, the Board examines factors such as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. It is well settled that the unit need only be an appropriate unit, not the most appropriate unit. Bartlett Collins Company, 334 NLRB No. 76, slip op. at 1 (2001)(citations omitted).

I conclude that the petitioned-for unit, as amended at hearing, is appropriate. The Employer contends that technicians on visiting teams’ trucks and cable pullers should be excluded from the unit and that the unit should be limited to telecasts currently in existence and

to telecasts produced from venues in Dade and Broward Counties only. I will address each of these issues in turn.

The crews working on the visiting teams' telecasts should not be excluded from the unit because they possess a sufficient community of interest with the other technicians. The only difference between the technicians working on the visiting teams' trucks and those working on the Employer's telecasts is that the crews on the visiting teams' trucks are supervised at that time by a different producer and director. However, every other term and condition of employment essentially remains the same for these employees. It appears that these employees receive the same pay, work the same hours, and use the same equipment as the other crews. Further, the crew that works on the visiting team's truck is drawn from the same "preferred list" as the crew that works on the Employer's telecasts. In addition, the technicians readily interchange between the home and visitor's truck. According to the Employer's own calculations, of the 61 freelance technicians who worked at least two visiting team telecasts, 44 worked at least 6 games on the home truck.

I further conclude that the unit should not be defined as one limited to the telecasts currently in existence as there is no basis for limiting the unit in this manner. The unit description covers all employees in certain defined classifications working in adjoining counties. In the event the Petitioner is certified and a real issue arises as to whether employees working on a new telecast share a community of interest with existing unit employees, either the Employer or the Petitioner may file a unit clarification petition at that time seeking to determine the unit placement of employees in question.

I also conclude that "cable pullers" should not be excluded from the unit. The fact that the cable pullers are not as skilled or experienced as the rest of the technicians or receive different wages is not a sufficient basis for excluding these employees. Where a group of employees are part of an employer's overall program in that they are functionally integrated with the rest of the workforce, they should not be excluded simply because they do not share all the same terms of

employment. See Huckleberry Youth Programs, 326 NLRB 1272, 1274 (1998). And, if their exclusion would result in a residual unit, which the Board seeks to avoid, then their inclusion is warranted. Id. (citations omitted). Here, the cable pullers are functionally integrated with the workforce and are part of the Employer's overall production program.¹⁵

I likewise conclude that there is no basis for limiting the unit description to Dade and Broward Counties and excluding Palm Beach County. The freelance technicians already perform work in Jupiter, which is in Palm Beach County, for the Marlins spring training games. These are the same employees who perform work for the Employer at its venues in Dade and Broward Counties. Although the Employer contends Jupiter is 71 miles from Miramar, where the Marlins home games are played, the technicians also work at different venues in Dade and Broward Counties that are many miles from each other.

Lastly, I note that the Employer asserts several bases in its brief for excluding "post-production" work from the unit description. The Employer contends that the phrase "post-production" is an industry term that typically means off-site editing work. I find no reason to conclude that this is the meaning to be attributed to this term for this unit description. As the Employer concedes, the only testimony with regard to "post-production" work in the record pertains to on-site work by a tape operator in preparing a game wrap up and highlight reel after the game. To the extent the Petitioner may attempt to characterize any off-site work as unit "post-production" work, I would agree with the Employer that such work would be excluded from the unit. However, because there is no reason to conclude that this is the meaning to be

¹⁵ To the extent that the Employer expresses a concern about the cable pullers' expectation of future employment, I note that the parties agreed to an eligibility formula applicable to all the unit employees, which is described below.

attributed to this term for this case, I find no basis to exclude “post-production” from the unit description in these circumstances.

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, and in accordance with the discussion above, I conclude and find as follows:

A. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

B. The Employer, SportsChannel Florida Associates d/b/a Fox Sports Net Florida, is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁶

C. The Petitioner, a labor organization, seeks to represent certain employees of the Employer.¹⁷

D. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

E. The following employees of the Employer constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

All regular part-time freelance employees in the categories of technical directors, camera operators, videotape operators, digital disc device operators (e.g., EVS, DDR, profile), video technicians (shaders), including assistant video technicians, audio technicians, audio assistants, Chryon/Infinit! operators, graphics coordinators, FoxBox/score box operators, stage managers and utility technicians (hereafter collectively referred to as “technicians”) performing work, including pre-production work, production work, and post-production work in connection with the telecasting of sports events in Dade, Broward, and Palm Beach Counties, excluding guards and supervisors as defined in the Act.

¹⁶ At the hearing, the parties stipulated that, SportsChannel Florida Associates, a New York general partnership with offices and facilities at 1550 Sawgrass Corporate Parkway, Sunrise, Florida 33323, owns and operates Fox Sports Net Florida, a basic cable sports broadcasting network. During the past calendar year, which period is representative of operations generally, SportsChannel Florida Associates derived gross revenue from operations in excess of \$100,000 and purchased and received goods, materials and services valued in excess of \$50,000 directly from points located outside the State of Florida.

¹⁷ At the hearing, the parties stipulated that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among employees in the unit found appropriate above. The employees will vote on the question of whether or not they wish to be represented by the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC for the purposes of collective bargaining. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this decision.

A. Voter Eligibility

At the hearing, the parties stipulated that those eligible to vote in the election are those in the unit who were employed in an included classification in the above-described bargaining unit for at least two ten-hour game calls in the twelve month period immediately preceding the issuance of a decision and direction of election, except that in the case of Fox Box/score box operators and stage managers, those eligible are those employed for at least two five-hour game calls in the 12 month period immediately preceding the decision and direction of election.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly it is hereby directed that within 7 days of this Decision, the Employer must submit to the Regional Office, an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and

the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Boulevard, Suite 530, Tampa, Florida 33602-5824, on or before June 16, 2003. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuously visible to potential voters for a minimum of 3 full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). An employer who fails to do so may not file objections based on the non-posting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, D.C. 20570-0001. This request

must be received by the Board in Washington by 5 p.m., EST, on June 23, 2003. This request may not be filed by facsimile.

DATED at Tampa, Florida, this 9th day of June 2003.

Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, FL 33602

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